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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 Francisco Lopez-Reyes,
13 Defendant.
14

No. CR-19-00328-001-PHX-DWL
ORDER

15 Defendant Francisco Lopez-Reyes (“Lopez-Reyes”) is charged with one count of
16 Reentry of Removed Alien, in violation of 8 U.S.C. § 1326. (Doc. 8.) Lopez-Reyes has
17 now filed a motion under 8 U.S.C. § 1326(d) to dismiss the Indictment (Doc. 17), the
18 government has filed an opposition (Doc. 22), and Lopez-Reyes has filed a reply (Doc.
19 25). As explained below, the motion will be denied.

20 **FINDINGS OF FACT**

21 A. Background Facts

22 In September 1988, Lopez-Reyes was born in Mexico. (Doc. 17 at 4.)

23 In or around 1992, when Lopez-Reyes was four years old, he was brought to the
24 United States by his mother. He eventually attended elementary school, middle school,
25 and high school in Arizona despite lacking legal status in the United States. (Doc. 17 at 4;
26 Doc. 17-5 ¶¶ 1-8.)

27 B. The August 2007 Stabbing Incident

28 On August 11, 2007, during the summer between his junior and senior years of high

1 school, Lopez-Reyes was in a park in Maryvale, Arizona when a knife fight broke out.
2 (Doc. 17 at 4-5.) As Lopez-Reyes was attempting to walk away, he was stabbed twice in
3 the back. (*Id.*) This attack caused Lopez-Reyes to sustain serious injuries requiring
4 hospitalization. (*Id.*)

5 Shortly after the incident, members of the Phoenix Police Department (“PPD”)
6 conducted an interview of “Ernie,” another person who’d been victimized during the
7 attack. (Doc. 17-3 at 10.) Ernie described the assailant “as approximately 5’8 to 5’10, 18
8 to 20, with spiky hair” and “said he could probably ID this Hispanic male again if he saw
9 him.” (*Id.*)

10 PPD detectives also interviewed another witness. She initially “said that she could
11 identify the Hispanic male that had the knife and will testify.” (Doc. 17-3 at 11-12.) Later,
12 she identified the assailant by name: “She said his name was Craig, but he went by C.J.
13 She said that she had gone to Tolleson High School with him, and also worked with him
14 [at a pizza parlor].” (*Id.* at 22-23.) She also told the police where they could find the
15 assailant and provided his cell phone number: “She stated that she didn’t know his full
16 name, but knew the apartments where he lived She checked her phone and found his
17 number.” (*Id.* at 24.)

18 Lopez-Reyes was also interviewed as part of the PPD investigation. (Doc. 17-3 at
19 27-30.) He initially told the police that “he did not know the individual who had stabbed
20 him.” (*Id.* at 28.) Following the interview, the PPD detective realized this was a lie: “After
21 I had initially interviewed [Lopez-Reyes], I compared my interviews [to] the interviews
22 that other investigators involved in this incident had conducted. I then learned that the
23 females who had been in the vehicle with [Lopez-Reyes] had indicated that the person who
24 stabbed [Lopez-Reyes] was known to them and possibly [Lopez-Reyes] as well.” (*Id.* at
25 29.) Accordingly, the PPD detective went back to Lopez-Reyes’s hospital room to re-
26 interview him. During this follow-up session, Lopez-Reyes acknowledged “that it was a
27 person who he knew from Tolleson High School as ‘CJ’” but “did not tell [the PPD
28

1 detective] why he had initially lied . . . about knowing who had stabbed him.” (*Id.*)¹

2 The knife-wielding assailant was apparently never prosecuted² and Lopez-Reyes
3 never provided any further assistance to the police. In a report dated October 25, 2007, a
4 PPD detective noted that “I had not heard from [one particular victim] or any of the other
5 victim or witnesses in this case. Several phone messages have been left for them. It
6 appears as [though] the victim and witnesses may not cooperate with the prosecution of
7 this case.” (Doc. 17-3 at 55.)

8 Lopez-Reyes has never applied for a U-Visa based on this incident and never
9 attempted to obtain certification from the PPD concerning his assistance. (Doc. 17 at 12.)

10 C. The Armed Robbery Conviction

11 During October and November 2010, Lopez-Reyes committed a series of robberies
12 of cellular phone stores. (Doc. 17 at 6.) During these robberies, he utilized an airsoft pistol.
13 (*Id.*)

14 In July 2011, Lopez-Reyes was convicted of three counts of Armed Robbery in
15 Maricopa County Superior Court and sentenced to a seven-year term of imprisonment.
16 (Doc. 17 at 6; Doc. 22-1.)

17 D. The Immigration Proceedings

18 On July 15, 2011, Lopez-Reyes signed a form entitled “Notice of Intent to Issue a
19 Final Administrative Removal Order.” (Doc. 17-4.) On the second page of this form, a
20 check-mark appears next to a provision stating: “I admit the allegations and charge in this
21 Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for
22 any form of relief from removal. I waive my right to rebut and contest the charges against
23 me. I do not wish to request withholding or deferral or removal. I wish to be removed to

24
25 ¹ Lopez-Reyes has submitted a declaration in which he suggests he didn’t really lie
26 to the PPD detective. (Doc. 17-5 ¶ 15.) The Court rejects this self-serving characterization
of the interview—the PPD detective made a point of saying, in his report, that Lopez-Reyes
had lied.

27 ² The parties’ briefs don’t definitively state whether “C.J.” was ever prosecuted, but
28 the Court infers from Lopez-Reyes’s discussion of his Accurant search (Doc. 17 at 5)—
which doesn’t mention any details of a criminal prosecution—that no legal proceedings
were ever instituted.

1 Mexico.” (*Id.* at 2.)

2 On January 18, 2017, after serving his state prison sentence, Lopez-Reyes was
3 removed to Mexico. (Doc. 8.)

4 ANALYSIS

5 “An alien charged with illegal reentry under § 1326 has a Fifth Amendment right to
6 collaterally attack [his] removal order because the removal order serves as a predicate
7 element of [his] conviction.” *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 755 (9th
8 Cir. 2015) (citation omitted). “That right is codified at 8 U.S.C. § 1326(d).” *Id.* One way
9 to prevail on such a collateral attack is to show that (1) the final order of removal was
10 entered in violation of the defendant’s due process rights and (2) the defendant suffered
11 prejudice resulting from the violation. *Id.* at 756.

12 Here, although the parties advance an array of arguments concerning whether
13 Lopez-Reyes’s due process rights were violated during his removal proceeding—Lopez-
14 Reyes contends his right to counsel was violated because he never affirmatively waived
15 that right and didn’t, in any event, make a knowing and intelligent waiver (Doc. 17 at 7-
16 11)—the Court finds it unnecessary to resolve those arguments. This is because Lopez-
17 Reyes cannot show prejudice.

18 In his motion, Lopez-Reyes contends his status as a victim of, and witness to, the
19 2007 stabbing incident would have rendered him eligible for a U-Visa and that it’s
20 “plausible” he would have obtained one (and, thus, avoided removal) had he been assisted
21 by an attorney during his immigration proceedings. (Doc. 17 at 10-13.) In support of his
22 motion, Lopez-Reyes provided a declaration from Margarita Silva, an Arizona-based
23 immigration attorney. (Doc. 17-5.) Ms. Silva states that the PPD “signs U certifications
24 in the true spirit of the U visa program” and that “my opinion [is] that in July 2011, Mr.
25 Reyes Lopez had . . . [a] plausible ground for relief in the form of a U visa” due to “the
26 severity of the assault in this matter (a stabbing) and that Mr. Reyes Lopez gave a statement
27 to the police, identified the attacker to the extent that he could, allowed a search of his
28 vehicle and stated his intent to prosecute the case.” (*Id.* ¶¶ 4-8.)

1 In its response, the government contends that, regardless of whether Lopez-Reyes
2 could have obtained a U-Visa certification document from the PPD, his prejudice claim
3 fails because he also would have needed to obtain a discretionary waiver from the federal
4 government and it's not plausible he would have obtained such a waiver in light of his
5 multiple convictions for armed robbery, the absence of "any on-going proceedings in
6 2011," and the absence of proof that his "cooperation actually assisted in the prosecution
7 of anyone." (Doc. 22 at 11-13.) In support of its response, the government provided a
8 declaration from Michaelyn Potter, an official from United States Citizenship and
9 Immigration Services ("USCIS"). (Doc. 22-7.) Among other things, Ms. Potter's
10 declaration explains that "[w]hen determining whether to exercise discretion to waive
11 criminal related inadmissibility grounds, USCIS will consider the number and severity of
12 the offenses of which the alien has been convicted. For cases that involve violent or
13 dangerous crimes or related to national security, USCIS will only exercise favorable
14 discretion . . . in extraordinary circumstances." (*Id.* ¶ 11.)

15 In his reply, Lopez-Reyes argues the Potter declaration is unavailing because it
16 "merely states the governing legal standards" and "offers neither statistics nor anecdotes—
17 nor any evidence or even any assertions—regarding the plausibility of a person with Mr.
18 Lopez's record obtaining an inadmissibility waiver." (Doc. 25 at 9.) In support of his
19 reply, Lopez-Reyes provided a new declaration from Laura Lichter, an Arizona-based
20 immigration attorney. (Doc. 25-3.) Among other things, Ms. Lichter avers that "I have
21 been aware of a number of cases with similarly serious criminal history and related
22 discretionary factors as that of Mr. Lopez Reyes who successfully pursued waivers, even
23 after having been deemed to have been convicted of a 'violent or dangerous' offense." (*Id.*
24 ¶ 15.) Ms. Lichter also states that one of the factors that would have supported Lopez-
25 Reyes's request for a waiver was "[t]he critical nature of his cooperation in investigating
26 the crime." (*Id.* ¶ 16(i).) Later on, Ms. Lichter adds that Lopez-Reyes's "bravery and self-
27 sacrifice" when "cooperat[ing] with law enforcement" would have bolstered his case for a
28 waiver. (*Id.* ¶ 18.)

1 Lopez-Reyes's collateral attack under 8 U.S.C. § 1326(d) fails because he cannot
2 demonstrate prejudice. Both of his experts' opinions are based on an inaccurate factual
3 premise—that he provided “critical” assistance to the police in their investigation and
4 prosecution of the 2007 stabbing incident. This is simply not true. Lopez-Reyes was one
5 of multiple witnesses who were interviewed in the aftermath of that incident. Other
6 witnesses were initially very helpful. Indeed, one witness identified the assailant by name,
7 told the police where the assailant lived, and even provided the police with the assailant's
8 phone number. Lopez-Reyes, in contrast, was the only witness who was singled out by the
9 police as having lied to them. Furthermore, although Lopez-Reyes initially suggested he
10 was willing to assist in the prosecution, the case fell apart after he and the other witnesses
11 refused to return the PPD detective's messages.

12 Lopez-Reyes's position is also undermined by the seriousness of his criminal
13 history. He committed a string of armed robberies in 2010 that resulted in a seven-year
14 state prison sentence. Although the weapon he used during those robberies was an airsoft
15 pistol, not a real gun, his crimes were still quite serious.

16 With this background in mind, it is not “plausible” that Lopez-Reyes would have
17 secured a discretionary U-Visa waiver from the federal government in 2011 had he been
18 represented by counsel during his immigration proceedings. Although Lopez-Reyes's
19 experts disagree with Ms. Potter over just how difficult it is to obtain such a waiver, the
20 bottom line is that Lopez-Reyes would have represented a particularly poor candidate—a
21 three-time armed robber whose half-hearted efforts to cooperate with the police concerning
22 an earlier crime were marred by lies and a failure to follow through when it counted.

23 This outcome is consistent with Ninth Circuit law. In *Cisneros-Rodriguez*, the
24 Ninth Circuit considered a § 1326(d) challenge by another defendant whose theory was
25 that “she was prejudiced by the due process violation [during her removal proceeding]
26 because, had she obtained counsel, it is plausible that she would have applied for and
27 obtained a U-visa.” *Id.* at 759. The court explained that, to demonstrate prejudice in this
28 context, a defendant must demonstrate the existence of a “plausible” ground for relief from

1 deportation—a standard the court further defined as “more than possible” but not
2 “probable.” *Id.* at 761. The court concluded that, although the issue of plausible
3 entitlement presented a “close[] question,” the defendant had succeeded in establishing it
4 because (1) she had been the victim of an extortion offense and served as “a critical witness
5 in the prosecution” of the offender³ and (2) her criminal record, although “substantial,”
6 consisted mostly of non-drug related crimes⁴ and she “had never been sentenced to more
7 than nine months in county jail” before becoming enmeshed in the drug-related activity of
8 the woman who was extorting her. *Id.* at 762. Here, in contrast, Lopez-Reyes didn’t
9 provide much assistance to the police (let alone testify in a court proceeding that resulted
10 in a conviction) and his criminal history is substantially more serious and troubling.

11 For these reasons, this case more closely resembles *United States v. Trinidad*
12 *Hernandez*, 759 Fed. App’x 590 (9th Cir. 2018), a recent unpublished decision by the Ninth
13 Circuit involving another § 1326(d) challenge premised on a U-Visa eligibility theory.
14 There, the court concluded that “Hernandez’s claimed entitlement to a U-Visa is not
15 plausible” because “[h]er case presents less sympathetic facts than *Cisneros-Rodriguez*,
16 where this Court described the issue of plausible entitlement to a U-Visa as a ‘close[]
17 question.’” *Id.* at 593. Specifically, the court noted that the defendant had been “sentenced
18 on three occasions to substantial periods of incarceration” and “does not appear to have
19 been substantively helpful in the prosecution of her husband on domestic violence
20 charges,” as she merely “initially cooperated when questioned” but “does not claim to have
21 been a witness in proceedings against him.” *Id.* Those, of course, are the same
22 circumstances presented here.

23 Finally, the three district court decisions cited in Lopez-Reyes’s briefs are factually
24 distinguishable because they involved defendants with less severe criminal records than

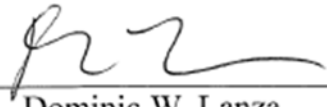
25 ³ Specifically, the defendant in *Cisneros-Rodriguez* forwarded reports of the extortion
26 to the Santa Clara County Sheriff’s Office and then “testified at a preliminary hearing.” *Id.*
27 at 752. This testimony persuaded the judge to make a probable cause finding, which in
turn prompted the extortionist to plead guilty. *Id.*

28 ⁴ The earlier crimes consisted of “a number of California state misdemeanors” and
“felony and misdemeanor fraud.” *Id.* at 751.

1 Lopez-Reyes who provided more significant assistance to law enforcement than Lopez-
2 Reyes. For example, in *United States v. Aguilar-Moya*, 2018 WL 3659304 (N.D. Cal.
3 2018), the defendant was the victim of a robbery offense who called the police to report
4 the crime and later “testified at the preliminary hearing.” *Id.* at *1, *6-7. The court found
5 that the defendant’s reporting and testimony were critical in securing the conviction of the
6 robber. *Id.* Additionally, the defendant’s criminal history did not include any “violent and
7 dangerous” offenses—the offense discussed in the opinion consisted of a “non-violent”
8 offense that “did not involve a weapon” and resulted in “no jail time.” *Id.* at *7-8.
9 Similarly, in *United States v. Cervantes*, 2016 WL 6472108 (C.D. Cal. 2016), the defendant
10 obtained a formal certification document from county officials confirming she was a victim
11 of, and had cooperated in the investigation of, certain underlying crimes, *id.* at * 3 & n.1,
12 and her most serious criminal conviction was for a non-violent drug offense that resulted
13 in a sentence less than half the length of Lopez-Reyes’s sentence. *Id.* at *1. And in *United*
14 *States v. Rusuleo-Flores*, 2012 WL 761701 (N.D. Cal. 2012), the defendant was a rape
15 victim whose reporting led to the arrest of her assailant and who later agreed to “wear[] a
16 wire” to assist ICE “in gang investigations.” *Id.* at *8, *11.⁵ Additionally, the defendant’s
17 worst conviction was for a theft offense that carried a sentence of less than eight months in
18 county jail. *Id.* at *2.

19 Accordingly, **IT IS ORDERED** that Lopez-Reyes’ Motion to Dismiss the
20 Indictment (Doc. 17) is **denied**.

21 Dated this 26th day of June, 2019.

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24 _____
Dominic W. Lanza
United States District Judge

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26 ⁵ Although the defendant in *Rusuleo-Flores* later recanted her allegations against her
27 assailant, which resulted in the criminal charges being dismissed, the district court
28 concluded she still deserved credit for being helpful to law enforcement because she was
only 14 years old at the time, she’d been pressured by family members to recant the
allegations, and “the statute and regulations explicitly contemplate a lower standard of
helpfulness for victims under 16, particularly as applied to these facts.” *Id.* at *10.